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PENGARAH TANAH DAN GALIAN NEGERI SELANGOR & ORS v. NUSA KOTA SDN BHD

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
HADHARIAH SYED ISMAIL JCA
B GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-501-12-2017]
27 SEPTEMBER 2022

C **Abstract** – *(i) Persons to whom land is alienated under the National Land Code are barred from making any claim against the State Authority on the ground that there is a shortfall in the land area as compared to the area in the provisional alienation; and (ii) It is only upon a plan approved by the Director of Survey and Mapping that the boundaries and boundary marks of a piece of land become conclusive.*

D

LAND LAW: *Alienation – Claim against State Authority – Shortfall in land area compared to area in provisional alienation – Whether claim barred – Whether size and area of land as per final title conclusive – Whether re-measurement could be ordered to ascertain actual area or size of land – National Land Code, s. 83(4)*

E

CIVIL PROCEDURE: *Res judicata – Striking off – Claim struck out on merits before trial commenced – Whether there should no longer be any case – Whether trial judge correct in granting reliefs and/or remedies that directly or indirectly affected rights and interests of party*

F The respondent, the proprietor of a piece of land, had acquired a registered interest on the said land after an alienation by the second appellant. The first appellant informed the respondent that the Majlis Mesyuarat Kerajaan Negeri Selangor had approved the respondent's application for the alienation of a Government land for the purpose of a commercial building. The G respondent was issued with Form 11A, in accordance with s. 177 of the National Land Code ('NLC'), a qualified title ('QT') held under individual title deed, measuring 0.6758 hectares equivalent to 1.67 acres ('PT1'). The fourth appellant was the proprietor of the neighbouring land ('PT853'). The respondent submitted that (i) prior to the issuance of the individual title for H the neighbouring land, PT853 had a land measurement of 1.58 acres only. The LA approved a plan delineating Lot 853 with a land measurement of 1.58 acres in area; (ii) PT 583 was alienated later and, therefore, could only comprise of the remaining land area after taking into account the land area for PT1. However, the QT deed for PT853 issued was with a land measurement of 6,961 square meters equivalent to 1.72 acres in area; and I (iii) the land area shown in the QT deed for PT853 was mistakenly stated as such or, otherwise, in error. Such mistake and/or error would have been

caused or otherwise attributed to the acts and/or neglect of the first to third appellants or each of them, in particular in the survey and determination of the boundaries of PT853 and PT1. The third appellant approved Pelan Akuan comprising land area of 6,958 square metres for PT853 and reduced PT1 to 5,944 square meters. This prompted the respondent to commence a claim at the High Court against the appellants. The fourth appellant applied to strike out the respondent's action and the application was allowed. The Judicial Commissioner ('JC') allowed the respondent's claim against the appellants for declaratory order and several consequential/ancillary orders which included, *inter alia*, ordering a re-survey by the third appellant of the whole of lots PT1 and PT53.

Held (allowing appeal)
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) The sizes of PT1 and PT853, as reflected in the QT, were not absolute as the final survey had not taken place. By virtue of s. 396(2) of the NLC, the law is clear that it is only upon a plan approved by the Director of Survey and Mapping ('DSM') that the boundaries and boundary marks of a piece of land become conclusive based on the approved plan. In light of the explicitly clear provisions of s. 396(2) of the NLC, the boundaries and boundary marks as per the QT could not be regarded as final and conclusive but provisional subject to change following the final and approved plan by the DSM. Likewise, the indefeasibility of a registered proprietor's title would only become fully operative upon the issuance of a final title as provided for s. 92(1) of the NLC. (paras 32-35)

(2) The JC erred in (i) ordering a re-survey by the third appellant of the whole of lots PT1 and PT53 notwithstanding the finality of the approved plan by the DSM for the purpose of issuance of the final title; and (ii) failing to consider that the role of the first to third appellants, in regard to the measurement and determination of boundaries, was to merely exercise an administrative function. Nowhere in the NLC nor in any other law applicable to the issue at hand states that, in the carrying out of the final survey, is there any requirement to take into consideration the date of the alienation of the land concerned. It was, at most, a practice adopted by Jabatan Ukur dan Pemetaan Malaysia or a licensed surveyor which does not have the force of law. Neither is there any requirement to factor in the area or size of the alienated land having a QT before the final survey is performed. (para 38-40)

(3) Persons to whom land is alienated under the NLC are barred from making any claim against the State Authority on the ground that there is a shortfall in the land area as compared to the area in the provisional

alienation. This is expressly stated in s. 83(4) of the NLC. The bar to commencing any action would include an action for a declaration that the approved plans issued in accordance with the procedure prescribed in the NLC are wrong and ought to be cancelled and that re-measurement is required. (paras 42 & 43)

(4) The JC had erred, in principle, in not appreciating that the respondent's claim against the fourth appellant had been struck out on merits before the trial commenced and there should not be any relief granted against the fourth appellant. Premised on the doctrine of *res judicata*, in view of the striking out application having been heard and decided on merits, there should no longer be any case against the fourth appellant. The JC had misdirected himself in that, despite having made the order on merits, he went on to hold that the suit against the fourth appellant had been abandoned and proceeded to grant reliefs and/or remedies that directly or indirectly affects the rights and interests of the fourth appellant. As the striking out order was a binding and valid order of the High Court, until and unless it was reversed on appeal, the respondent should be estopped from pursuing any relief against the fourth appellant. Hence, the orders granted by the JC against the fourth defendant were misconceived and merited being set aside. Further, the JC had fallen into error of law when he ordered that the final measurement in PT853 be cancelled or amended and for a new land title to be issued after the re-measurement of the land. (paras 44, 53 & 55)

(5) The final title obtained by the fourth appellant could not be set aside or impeached save in the limited circumstance provided in s. 340(2) of the NLC. The final title was rendered conclusive under s. 89 of the NLC. In practical terms, the size and area of the fourth appellant's land in this instance, as per the final title, was conclusive evidence without any room for re-measurement to ascertain its actual area or size. Essentially, upon the issuance of the register document of title, there is no provision for any re-measurement of the land boundaries. It was plain that the JC failed to appreciate the correct legal position under the NLC in the resolution of the present dispute pertaining to the boundaries after the final title had been issued for the lots in question. (paras 57 & 60)

Case(s) referred to:

Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd [2012] 2 CLJ 81 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

ECH Development & Management Sdn Bhd v. Prabagaran Perumal & Anor And Another Appeal [2020] 7 CLJ 451 CA ***(refd)***
Government Of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Hartecon JV Sdn Bhd v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Johnny Tumbek & Anor v. Mambak Medan & Ors [2017] MLRHU 1 ***(refd)***
Wong Sew Yun & Ors v. Chelingga Asuh [2012] 10 CLJ 180 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
National Land Code, ss. 77(2)(a), 83(1), (3), (4), 84, 89, 92(1), 176(2)(a), 177, 340(1), (2), (3), 396(2)

For the 1st-3rd appellants - Husna Abdul Halim, Maizatul Munirah Abdul Rahman & Amira Haziqah Zulkifli); Selangor State Legal Advisor
For the 4th appellant - Justin Voon Tiam Yu, Alvin Lai Kok Wing & Lin Pei Sin; M/s Justin Voon Chooi & Wing
For the respondent - Jeyakumar Palakrishnar & Nik Asilah Aziz; M/s Zahir Jeya & Zainal

[Editor's note: For the High Court judgment, please see Nusa Kota Sdn Bhd lwn. Pengarah Tanah Dan Galian Negeri Selangor & Yang Lain [2018] 1 LNS 1236 (overruled).]

Reported by Najib Tamby

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] This appeal is by the appellants, who were defendants in the court below ("D1 to D3") against the decision of the learned Judicial Commissioner ("LJC") at the Shah Alam High Court ("HC") wherein the LJC allowed the plaintiff/respondent's claim against D1 to D3 for declaratory orders and several consequential/ancillary orders. The decision followed a full trial involving the plaintiff and D1 to D3 only. As for the fourth defendant ("D4"), they successfully obtained an order to be struck out from the suit, which order remains valid and has not been set aside. D4's inclusion in this appeal is pursuant to an order of the Federal Court allowing D4 to intervene at the Court of Appeal as the fourth appellant.

Factual Background

[2] The respondent was at all material times the proprietor of all that land held under Individual Title Deed HSD 110086, Lot. No. 4, Bandar Sunway, District of Petaling, State of Selangor Darul Ehsan ("PT1") and acquired a registered interest therein on 26 April 1997 after alienation by the second appellant.

[3] By letter dated 27 April 1994, the first appellant informed the respondent that the Majlis Mesyuarat Kerajaan Negeri Selangor had approved the respondent's application dated 1 November 1991 for alienation of a Government land with a measurement of 1.67 acres in area at Kampung Lindungan, Kilometer 16, Lebuhraya Kuala Lumpur/Kelang for purpose of commercial building.

[4] On 15 March 1995, the respondent was issued with Form 5A requiring the respondent to pay RM18,984 tax for the first year, RM4,274,857 for premium, RM60 for Penyediaan dan Pendaftaran Suratan Hakmilik dan Suratan Hakmilik Tetap, RM10 for plan preparation and RM10 for notice.

[5] On 12 April 1997, the respondent rendered a payment of RM715 only being the charge for Upah Sukat Batu Sempadan for the final survey to be carried out by the third appellant upon issuance of a request for survey by the Petaling Land Administrator.

[6] The respondent rendered payment and on 26 April 1997, the respondent was issued with Form 11A in accordance with s. 177 of the National Land Code ("NLC"), a qualified title held under Individual Title Deed Hakmilik Sementara HSD 110086, Lot. No. 1, Bandar Sunway, District of Petaling, of all that referred to as PT1, measuring 0.6758 hectares equivalent to 1.67 acres.

[7] The fourth appellant was the proprietor of the neighbouring land on the northern side of PT1, held under Individual Tile Deed HS (D) 223743, Lot No. 853, Bandar Sunway, District of Petaling ("PT 853") and had acquired its registered interest in PT853 on 29 August 2013.

[8] The respondent averred that at all relevant times prior to the issuance of individual title for the neighbouring land, PT853 had a land measurement of 1.58 acres only.

[9] On 25 June 2004, the Petaling Land Administrator approved a plan delineating Lot PT853 with a land measurement of 1.58 acres in area.

[10] On 30 October 2004, a letter was copied to the respondent where the Majlis Perbandaran Petaling Jaya attached a "Pelan Cadangan Rizab Jalan selebar 50 Kaki di Tanah 1.58 Ekar yang diluluskan kepada PKNS".

[11] The respondent averred that PT853 was alienated later and therefore can only comprise of the remaining land area after taking into account the land area for PT1.

[12] However, on and/or about 30 August 2005, qualified title for PT853 was issued under Individual Title Deed HS (D) 223743, Lot No. 853, Bandar Sunway, District of Petaling, State of Selangor Darul Ehsan with a land measurement of 6,961 square meters equivalent to 1.72 acres in area.

[13] The respondent submitted that land area shown in the qualified title deed for PT853 is mistakenly stated as such or otherwise in error. Such mistake and/or error would have been caused or otherwise attributed to the acts and/or neglect of the first, second and third appellants or each of them, in particular in the survey and determination of the boundaries of PT853 and PT1.

[14] The third appellant had on 23 December 2007 approved Pelan Akuan 108138 comprising land area of 6,958 square metres (1.719 acres) for Lot 62142 (PT853).

[15] The third appellant had also purportedly approved Pelan Akuan 202952 for Lot 86263 (PT1) reduced to 5,944 square metres (1.4688 acres).

[16] The fourth appellant is named as a defendant in this action as it had intervened in a civil action instituted by the plaintiff against the first and second defendants at the High Court at Shah Alam, Originating Summons No. 24-962-06-2013, which civil action was subsequently withdrawn on 11 July 2014 in order to enable the respondent to file the instant writ of summons by including the third defendant as a party.

[17] The respondent claims the following reliefs:

(i) a declaration that the Pelan Akuan 108138 for PT853 with the land area of 1.719 acres is erroneous and ought to be cancelled;

(ii) a declaration that the Pelan Akuan 202952 for PT1 with the land area of 1.4688 acres is erroneous and ought to be cancelled;

(iii) an order that the first and/or third defendants be directed to effect the cancellation of Pelan Akuan 108138 and Pelan Akuan 202952;

(iv) an order that the third defendant conduct a fresh survey of all that lands held under Individual Title Deed HSD 110086, Lot. No. 1, Bandar Sunway, District of Petaling, State of Selangor Darul Ehsan ("PT1") and Individual Title Deed HS (D) 223743, Lot No. 853, Bandar Sunway, District of Petaling, State of Selangor Darul Ehsan ("PT853") so that the boundaries be re-determined as envisaged under s. 83 of the National Land Code;

(v) that the third defendant issue a fresh Pelan Akuan for PT1 and for PT 853 after the compliance and fulfilment of the order in prayer (iv);

(vi) that the first defendant issue Final Title Deed(s) for PT1 and for PT853 after the compliance and fulfilment of the order in prayer (iv);

(vii) that amounts found due or become payable to or by the second defendant shall be re-computed and paid within 14 days of the fresh survey being carried out pursuant to the order in prayer (iv);

(viii) that the defendants and/or each of them shall do all such things as may be necessary to give effect to the orders/judgment aforementioned;

(ix) that the plaintiff is given liberty to apply for such orders and/or reliefs that may be so required;

(x) a *Sanderson* order in respect of costs against the unsuccessful defendant against the other;

(xi) alternatively, the costs of this action to be borne by the defendants;

(xii) damages to be assessed;

(xiii) interest on any judgment sum in accordance with s. 11 of the Civil Law Act 1956 at such rate and for such period as deemed fit by this Honourable Court; and

(xiv) such other reliefs as deemed fit and proper by this, Honourable Court.

[18] The fourth appellant applied to strike out the respondent's action. On 24 February 2015, the High Court allowed the fourth appellant's application to strike out the respondent's claim.

[19] On 20 November 2017, the LJC allowed the plaintiff's/respondent's claim. The LJC also ordered RM30,000 costs to be paid to the respondent by the appellants.

Our Decision

[20] We will start our analysis by duly considering the appellants' defence and their case before us which in gist is as summarised in the respondent's submission as follows:

> The Appellants in their Defence contend that the measurement stated in the Qualified Title is temporary and should there be any discrepancies and/or reduction in the measurement later, no claim whatsoever can be made against the Appellants and that the provisions in Section 84 of the NLC would prevail. That aside, the Appellants argue that PT 853 was issued with Final Title although in the midst of proceedings at the High Court, so no claim can be made against the Appellants since the land measurement is conclusive.

[21] The LJC's finding based on the available evidence before him was that the respondent had clearly proved that there was negligence on the part of D1 and D3 the existence of the plot of land referred to as Lot No. PT1, Bandar Sunway ("PT1"). Thereafter, the LJC gave the declaratory orders and various other consequential orders as prayed for.

[22] Several issues were raised by first to third appellants in support of this appeal as to the correctness of the LJC's finding of negligence against first to third appellants. It was correctly submitted by the respondent that the issues in respect of this appeal raise the question whether the LJC of the High

Court acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. In this regard the respondent sought to demonstrate from the submissions that the LJC had correctly acted on guiding principles of law, did not commit any error and meticulously considered matters which demanded consideration in arriving at his decision.

[23] The respondent's position was that it is settled law that an appellate court would be slow to interfere with the finding of fact by the trial judge based on the totality of the evidence and the credibility of witnesses which the trial judge had perceived. In *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1, the Supreme Court held as follows:

> As an appellate court we would not like to interfere with the findings of fact of the trial judge who saw and heard the witnesses and made an assessment on the credibility and weight of evidence before him. He did not misdirect himself in law or in fact.

[24] Reference was also made to *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 23, where Raja Azlan Shah CJ (Malaya) held as follows:

> An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration.

[25] We were urged not to interfere with the decision of the High Court because the appeal before us were essentially a factual dispute over the demarcated measurement of two neighbouring lands whereby from the evidence, there is a clear overlap of boundaries arising from the neglect on the part of the appellants.

[26] The appellants, on the contrary, sought to impress upon us that there were several important errors in the decision of the LJC that warranted our interference. First, that the LJC had erred in failing to take into account or to consider that the purpose of issuing the qualified title ('hakmilik sementara') was to enable the land to be alienated or for the title to be issued before the final survey and the final title would be conclusive after the measurement is done and approved.

[27] We were informed that the LJC had accepted that the land area when the qualified title ('QT') was issued was not final and in normal circumstances it would not cause any problem. However, the appellants contended, in the case of Lots PT1 and PT853 the situation was different. Bearing in mind that the lot size in the QT is only temporary and likely to change upon the final survey being done considering s. 83(1) of the National Land Code ('NLC') which reads as follows:

A 83. Survey for purposes of alienation under final title

(1) Subject to sub-sections (2) and (3), where any land is surveyed in accordance with the provision of section 396 for the purpose of its alienation under final title, the boundaries determined on the survey shall accord as nearly as may be with those indicated by the plan and description by reference to which the approval of the State Authority was given.

[28] It would be instructive to look at the provisions of s. 176 NLC to have in mind the purpose and effect of a QT. For convenience, we reproduce this section that reads as follows:

C 176. Purposes and effect of qualified title.

(1) The purposes of qualified title are:

(a) To enable land to be alienated in advance of survey;

(b) To enable title to be issued in advance of survey:

D (i) To the individual portions ... land is …, or

(ii) To the combined area to be formed by the amalgamation of any such lands …

(2) Qualified title shall confer on the proprietor the like rights in every E respect as those conferred (as mentioned in section 92) by final title, save that:

(a) The boundaries of the land shown on the document of title thereto shall be provisional only except so far as any of them may have been established by any earlier survey; and

F (b) Unless otherwise provided for under this Act, the land shall not be capable of being sub-divided or partitioned, or included in any amalgamation, nor shall any building thereon be capable of subdivision.

(3) The alienation of land under qualified title, and the issue of G qualified title in cases of sub-division, partition and amalgamation, shall be effected in accordance with the provision of Chapters 2 and 3 respectively; and qualified title may be converted into final title in accordance with the provisions of Chapter 4.

[29] For any land to be alienated under QT, the approval of the State H Authority is required but before an alienation under that title can be done, a survey must be done in accordance with the provisions of s. 396 of the NLC.

[30] As emphasised by the appellants, the purpose and effect of the issuance of a QT are expressly spelt out in the provisions of s. 176 of the NLC and I as such, there can be no doubt on this point in relation to the dispute in the present case. In particular, that by virtue of s. 176(2)(a), NLC, the

boundaries as stated in a QT are provisional in nature until the issuance of a final title. This express provision of the NLC is, in our view, of significance in the determination of this appeal in that the LJC had purportedly not given due weight to this provision in making a finding that Lots PT1 and PT853 were purportedly different in regard to the application of s. 176(2)(a) of the NLC.

[31] It is also abundantly clear that for a QT to be converted to a final title it is mandatory for a final survey to be done and approved by the Survey Department (s. 77(2)(a), NLC).

[32] In the circumstances, we are inclined to agree with the appellants' proposition that the sizes of PT1 and PT853 as reflected in the QTs are not absolute as the above final survey had not taken place.

[33] By virtue of s. 396(2) of the NLC, the law is clear that it is only upon a plan approved by the Director of Survey and Mapping ("DSM") that the boundaries and boundary marks of a piece of land become conclusive based on the approved plan. For convenience, s. 396(2) the NLC provides that:

> (2) Any plan approved by the Director of Survey and Mapping under paragraph (e) of sub-section (1) shall be filed in his office, and (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed of any river) shall be conclusive evidence of the boundaries, boundary marks and area of the land to which it refers and *prima facie* evidence of the lot number thereof.

[34] In the light of the explicitly clear provisions of s. 396(2) of the NLC, the boundaries and boundary marks as per the QT cannot be regarded as final and conclusive but provisional subject to change following the final survey and approved plan by the DSM. (See *Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd* [2012] 2 CLJ 81; [2012] 7 MLJ 149).

[35] Likewise, the indefeasibility of a registered proprietor's title would only become fully operative upon the issuance of a final title as provided for in s. 92(1), NLC as follows:

> (1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.

[36] The next issue raised for our consideration was whether the LJC had erred in failing or omitting to consider that the respondent's remedy for the shortfall in the land size as a result of the measurement for the purpose of the final title lay in the re-computation of land revenue previously paid.

[37] Re-computation of land revenue for the above purpose is provided for in s. 84, NLC as follows:

84. Re-computation of items of land revenue after survey.

(1) After any land has been surveyed for the purpose of its alienation under final title, and before it is so alienated, all items of land revenue previously paid in respect thereof which were computed on the basis of the area provisionally approved for alienation shall be recomputed on the basis of the actual area of the land as established by the survey; and any amounts underpaid or overpaid in respect thereof, or in respect of survey fees:

(a) shall become payable to or by the State Authority at the time when the land is alienated as aforesaid; and ...

[38] In view of the specific remedy prescribed in s. 84, NLC, we agree with the appellant that the LJC had erred in ordering a resurvey by the third appellant of the whole of Lots PT1 and PT853 notwithstanding the finality of the approved plan by the DSM for the purpose of issuance of the final title.

[39] The LJC was also wrong for failure to consider that the role of the first to third appellants in regard to the measurement and determination of boundaries was to merely exercise an administrative function.

[40] Nowhere in the NLC nor in any other law applicable to the issue at hand that in the carrying out of the final survey is there is any requirement to take into consideration the date of the alienation of the land concerned. As highlighted by the appellants, it was at the most a practice adopted by JUPEM or a licensed surveyor which does not have the force of law. Neither is there any requirement to factor in the area or size of the alienated land having a QT before the final survey is performed.

[41] We are satisfied that the evidence disclosed without doubt that appellants first to third had complied with the provisions of s. 83(3) of the NLC by referring the difference in the area of the land Lot PT1 to the State Authority ("PBN") and thereafter, abided by the decision of the PBN ("MMKN 2013"). The provisions of s. 83(3) NLC as below are material to the resolution of the present dispute:

(3) Where it appears to the Director of Survey that the area enclosed by the boundaries determined on any such survey is substantially different from that provisionally approved for alienation, he shall, before approving any plan of the land under the said section 396, refer the matter to the State Authority, and cause the boundaries to be redetermined to such extent, and in such manner, if any, as the State Authority may direct.

[42] We were also urged to have in mind that persons to whom land is alienated under the NLC are barred from making any claim against the State Authority on the ground that there is a shortfall in the land area as compared to the area in the provisional alienation. This is expressly stated in s. 83(4), NLC as follows:

(4) No person to whom any land is alienated under this Act shall have any claim against the State Authority on the ground that the volume in fact so alienated is smaller than that provisionally approved for alienation.

[43] In our considered view, the bar to commencing any action would include an action for a declaration that the approved plans issued in accordance with procedure prescribed in the NLC are wrong and ought to be cancelled and that remeasurement is required.

[44] As regards the fourth appellant (D4), we concur with the position taken by them that the LJC had erred in principle in not appreciating that the respondent's claim against the fourth appellant had been struck out on merits before the trial commenced and there should not be any relief granted against the fourth appellant (*res judicata*). It was argued that premised on the doctrine of *res judicata*, in view of the striking out application having been heard and decided on merits, there should no longer be any case against D4. Hence, that the LJC had misdirected himself in that despite having made the order on merits, went on to hold that the suit against D4 had been abandoned (digugurkan) and proceeded to grant reliefs and/or remedies that directly or indirectly affects the rights and interests of D4. It must be noted that D4 had not been heard on the said reliefs/remedies whereas it is settled law that being no longer a party to the instant suit, any order or rectification of the Land Register should not deprive them of their land which they purchased *bona fide* and no order should be made affecting them adversely, in their absence and without being given the opportunity of being heard or to defend themselves: see *Wong Sew Yun & Ors v. Chelingga Asuh* [2012] 10 CLJ 180; [2012] 5 MLRA 153; [2012] 5 MLJ 198. (See *Johnny Tumbek & Anor v. Mambak Medan & Ors* [2017] MLRHU 1).

[45] We agree with the principle applied in *Johnny Tumbek* (*supra*) as above.

[46] A similar view was expressed in the case of *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1 at p. 679 (CLJ); p. 30 (MLJ), the Court of Appeal held that:

(ii) In addition, it should be dismissed under the rule that the plaintiff should not be allowed to prove its case against non-parties. That too when the pleadings say 'nasty' things against the third and fourth defendants to demean their integrity. (see paras 15 and 16 on issues to be tried). And that too by naming them and not serving on them will in actual fact be abhorrent to notion of justice and fair play. It is the duty of the court to ensure the trial process is not abused whether there was objection or no objection by the party concerned. The trial court should not have lent its stage at all based on fairness rule advocated in the Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holding Sdn Bhd* [2007] 5 MLJ 501; [2007] 4 CLJ 725 …).

[47] Importantly, although the respondent amended their statement of claim after the striking out, they still retained reliefs which affected the fourth appellant and/or its land.

[48] We are in agreement with D4's contention that the LJC ought not to have given any relief against D4 after the claim against D4 had been struck out without any appeal against this order which resulted in D4 not being involved any further in the suit. Also, that the grant of relief against D4 was in direct contradiction with the striking out order.

[49] Our attention was rightly drawn to the following excerpt from the Federal Court oral judgment in respect of D4 (fourth appellant)'s appeal to intervene in the instant appeal.

> … In our view, the present High Court Order is in direct contradiction with the striking out order and it is on this basis we will answer the question posed in the negative. Accordingly, we will allow this appeal and in the circumstances of this appeal, we make no orders to cost. Alright, so the matter would now be remitted/heard in the Court of Appeal okay.

[50] Likewise, our opinion is that the order made by the LJC clearly affecting the rights and interest of D4 to the subject land was in direct and obvious contradiction with the striking out order.

[51] For completeness, on the issue of *res judicata* and/or issue estoppel raised by D4, it would be instructive to refer to the judgment in the landmark case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, at pp. 113 to 114 (CLJ); pp. 65 to 66 (MLJ) (Court of Appeal).

> … Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the suit until its reversal on appeal. In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken *res judicata*.
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> …
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> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly …

[52] We have also noted the trite principle that the doctrine of *res judicata* also applies as between different stages in the same litigation (see *Government Of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74, 76).

[53] We do not propose to comment any further on the *res judicata* issue except to state our conclusion that as the striking out order dated 24 February 2015 is a binding and valid order of the High Court until and unless it is reversed on appeal, the respondent should be estopped from pursuing any

relief against D4. Hence, the orders granted by the LJC against D4 are misconceived and merit being set aside. We also do not propose to comment further on the purported breach of the principles of natural justice in respect of the said orders.

[54] Most importantly, we are on common ground with the fourth appellant as to the finality of its title and a principle of indefeasibility of that title based on s. 340(2), NLC. We agree that the LJC had erred in not recognising the status of the fourth appellant's title and for failing to judicially appreciate that the judgment in favour of the respondent would adversely affect D4's interests and the indefeasibility of its final title.

[55] We are constrained to hold that the LJC had fallen into error of law when he ordered that the final measurement in PT853 (the fourth appellant's land) be cancelled or amended and for a new land title to be issued after re-measurement of the land. The LJC had failed to have in mind the crucial fact that after the action against D4 had been struck out but before the trial commenced against D1 to D3, D4 had been issued the final title to PT853. A vital point of law not taken into account by the LJC was that upon issuance of the final title, D4 had acquired an indefeasible title pursuant to s. 92(1) and s. 340(1) of the NLC which rendered the declaratory orders made concerning PT853 wrong in law.

[56] We would, with respect, adopt the judgment in *ECH Development & Management Sdn Bhd v. Prabagaran Perumal & Anor And Another Appeal* [2020] 7 CLJ 451; [2020] 4 AMR 761 where the Court of Appeal held:

> [14] It is a given that under the National Land Code the title is everything and more so that final title. One's title and interest so registered is indefeasible. Section 92 of the National Land Code ("NLC") decision as follows:
>
> > 92. Indefeasibility of final title, and rights of dealing *etc.*
> >
> > (1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.
>
> [15] One does not go behind the title unless there is fraud, forgery, void or insufficient instrument or one of the vitiating factors under section 340 NLC where the title or interest of a person registered against the title may be set aside. Section 340 provides as follows:
>
> > 340. Registration to confer indefeasible title or interest, except in certain circumstances.
> >
> > (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

[57] To conclude on this vital point, the law is clear that the final title obtained by the fourth appellant cannot be set aside or impeached save in the limited circumstance provided in s. 340(2) NLC.

[58] A perusal of the respondent's statement of claim would reveal without doubt that nothing is pleaded on any of the circumstances laid down in s. 340(2), NLC. Neither is there any mention of the grounds relied upon by the respondent upon which D4's indefeasible title to the land PT853 could be set aside under the provisions of s. 340(2) NLC. There is also no declaratory relief sought that the said title be set aside for being void pursuant to s. 340(2) and (3) NLC. As rightly brought to our attention there is simply no frontal attack on the fourth appellant's title and therefore, no adverse claim can be brought against the title.

[59] We concur with the appellants that the error of the LJC in ordering remeasurement of PT1 and PT853 is that there was no such claim premised on s. 340(2) NLC to defeat the individual title of D4.

[60] It bears reiterating that the final title is rendered conclusive under s. 89 of the NLC. In practical terms, the size and area of D4's land in this instance as per the final title is conclusive evidence without any room for remeasurement to ascertain its actual area or size. Essentially, upon issuance of the register document of title, there is no provision for any remeasurement of the land boundaries. It is plain that the LJC had failed to appreciate the correct legal position under the NLC in the resolution of the present dispute pertaining to the boundaries after the final title had been issued for the lots in question.

Conclusion

[61] In view of the foregoing analysis of the factual matrix and having borne in mind the relevant provisions of the law applicable to the resolution of the present dispute, we are inclined to uphold the appellants' defence that the measurement stated in the QT is temporary and should there be any discrepancies and/or reduction in the measurement later, no claim whatsoever can be made against the appellants and that the provisions in s. 84 of the NLC would prevail to defeat the respondent's claim. The crucial fact to which due weight had to be given is that a final title had been issued for PT853 which barred any claim being made against the appellants because the land measurement was conclusive.

[62] In our judgment, that LJC had plainly erred in fact and law in holding that the respondent was entitled to the declaratory orders prayed for, in particular, that the certified plans were wrong and ought to be cancelled pursuant to s. 84(4), NLC.

[63] Having found merits in this appeal, we concluded that the appeal should be allowed and the LJC's decision be set aside. At the conclusion of the appeal, the decision that we pronounced is this:

> The orders made which affect the 4th defendant are unsustainable as the 4th defendant was no longer a party to the suit. This therefore warrants appellate intervention.
>
> As to the orders against the 1st, 2nd and 3rd defendants, we find that since there is compliance with the requirements of s. 83 of the NLC and the difference in measurement has been referred to the State Authority for their consideration and approval, following which the State Authority had confirmed the certified plan we find that the orders cannot stand.
>
> Wherefore, the appeal is allowed and the decision of the High Court is set aside. Under the circumstances, we exercise our discretion to order that parties shall bear their own costs.